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In the

Supreme Court of the United States

October Term, 1996

STATE OF MISSOURI,

Petitioner,

v.

EMORY M. FUTO,

Respondent.

On Petition for Writ of Certiorari
To the Missouri Court of Appeals
For the Eastern District

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WEST VIRGINIA AND WISCONSIN AND THE TERRITORY OF THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the conviction of a criminal defendant must be reversed if a trial judge issues an order which precludes the defendant from discussing his ongoing testimony with his attorney during an overnight recess in his cross-examination, but permits all other discussion between defendant and counsel.

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The amici curiae states and territory, through their undersigned attorneys general, respectfully submit this brief in support of the petitioner State of Missouri.

INTEREST OF THE AMICI CURIAE

Recesses of varying lengths occur for a host of legitimate reasons in even the briefest of criminal trials. Oftentimes, a recess will occur while the defendant is on the witness stand. No witness, including a criminal defendant, has a right to discuss his ongoing testimony with counsel during the recess. It logically follows that a trial judge should be able to issue an order narrowly tailored to prohibit such a discussion. This Court's decisions in *Geders v. United States,* 425 U.S. 80 (1976), and *Perry v. Leeke,* 488 U.S. 272 (1989), however, cast serious doubt on a trial court's ability to do precisely that. The *Perry* Court described the line between what is and what is not constitutional as "a thin one," 488 U.S. at 280; trial courts have had to guess when that "thin" line is crossed or even approached. Because this issue arises in countless criminal trials, the 24 amici states and territory have a strong interest in this Court clarifying this area of the law.

This interest is made even stronger by the lower courts' reading of *Perry* as mandating automatic reversal when an error is made. This severe result -- which in this case led to the reversal of a multiple-murder conviction -- inevitably has a powerful chilling effect on judges and prosecutors who seek to enforce the ban on defendants discussing ongoing testimony with their counsel. The states therefore also have a further interest in this Court revisiting and clarifying whether the prejudice analysis adopted in *Strickland v. Washington*, 466 U.S. 668 (1984), and the harmless error doctrine apply in this setting.

REASONS FOR GRANTING THE WRIT

A. Certiorari Should Be Granted Because The Absence Of A Clear Rule On The Limits Trial Courts Can Place On Communications Between Defendants and Counsel During Breaks In Defendants' Testimony Has Caused Conflict Among The Courts And Chilled Enforcement Of The Ban On Defendants Discussing Their Ongoing Testimony With Counsel.

This Court held in *Perry* that a trial judge may order a defendant and defense counsel not to discuss anything during a "brief" recess because of the "virtual certainty" that the discussion will only concern the ongoing testimony. 488 U.S. at 283-84. Under *Geders*, however, a trial judge may not ban a defendant and defense counsel from discussing "anything" during an overnight recess because that broad order coupled with the length of the recess would likely infringe on proper consultation about matters unrelated to the testimony. 425 U.S. at 88. The large grey area between these two decisions has been a source of considerable confusion.

In particular, neither *Geders* nor *Perry* expressly resolved whether a narrowly-tailored order prohibiting only the discussion of the defendant's ongoing testimony during an overnight recess (or during any recess other than a "brief" one) violates the Sixth Amendment. This Court should grant certiorari to answer that question in this case because (1) the uncertainty as to the rule has left the lower courts in severe conflict, and (2) this uncertainty -- and the threat of automatic reversal if error is found -- have inevitably made judges and

prosecutors reluctant to act to prevent improper interference with defendants' testimony during a recess when the recess is any longer than the fifteen minute one discussed in *Perry*. This uncertainty undermines the principles of *Perry* and needlessly jeopardizes many criminal convictions.

The amici states submit that this Court can provide needed clarity in this area by granting the State of Missouri's petition for a writ of certiorari and expressly holding that the scope of the trial court's order is dispositive. Where the trial court prohibits a defendant and his counsel from discussing ongoing testimony during a break but does not prohibit them from discussing any other aspect of the trial, the order should be found constitutional regardless of the length of the break.

1. ***Conflict Among the Courts***. A "crazy-quilt" of decisional law has been created by the uncertainty in the law. Some courts, such as the Missouri court in this case, have focused primarily on the length of the recess and held that an overnight recess is constitutionally too long even though the order is narrowly tailored to prevent only discussion of the defendant's ongoing testimony. See, e.g., *State v. Futo*, 932 S.W.2d 808, 812-15 (Mo. Ct. App. 1996); *United States v. McLaughlin*, 1997 U.S. Dist. LEXIS 2113 (D.D.C. Feb. 14, 1997) (distinguishing *Perry* from *Geders* based on length of recess); *United States v. Cobb*, 905 F.2d 784, 791 (4th Cir. 1990), cert. denied sub nom. *Hatcher v. United States*, 498 U.S. 1049 (1991) (weekend recess too long); *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986) (narrow order banning discussion only of defendant's testimony over weekend recess requires automatic reversal because the recess was "substantial"); *People v. Joseph*, 646 N.E.2d 807, 809 (N.Y. 1994) (narrow order forbidding discussion of testimony during

weekend recess violates Sixth Amendment because the "critical factor" in the analysis is the length of time defendant is denied access to counsel).

Other courts have focused primarily on the scope of the trial court's order: if it is limited in scope to prohibiting discussion of the defendant's ongoing testimony, it is constitutional irrespective of the length of the break. See, e.g., *Webb v. State,* 663 A.2d 452, 455-61 (Del. 1995) (upholding narrowly-tailored order during overnight recess); *Snyder v. State*, 657 A.2d 342, 356-57 (Md. Ct. Spec. App. 1995) (same); *Parker v. State*, 469 S.E.2d 410 (Ga. Ct. App. 1996) (no violation when weekend recess is coupled with narrowly-tailored order limited to ongoing testimony unless defendant or counsel indicate on the record they wished to consult about other matters and were prevented from doing so by the order).

Therefore, what is an unconstitutionally "long" recess in one jurisdiction, necessitating reversal, is constitutional in another. Moreover, in those jurisdictions where the courts have looked to the length of the recess -- rather than to the scope of the order -- there is additional uncertainty created. Where, between a fifteen-minute break and an overnight recess, is the line drawn?

2. ***Impact of the Uncertainty***. The law as it stands now is a trap for judges and prosecutors who in good faith seek only to prevent improper third-party influence on defendants' ongoing testimony. Because the constitutional line "is a thin one," *Perry,* 488 U.S. at 280, and the penalty for crossing that line has been automatic reversal, imposing any restrictions upon discussions between defendants and counsel during breaks in defendants' testimony is extremely risky. Without

express guidance from this Court, improper coaching by defense counsel during recesses will remain largely unchecked.

A criminal defendant has "no constitutional right to consult with [counsel] while he is testifying." *Perry*, 488 U.S. at 281. Moreover, it is the duty of the trial judge to ensure that cross-examination of the defendant is unfettered by third-party interference in order to protect the truth-finding function of the trial. *Id.* at 282-83. The current state of the law makes it extremely difficult for trial judges to fulfill that duty. Judges in jurisdictions such as Missouri are forbidden from banning discussions of ongoing testimony during "long" breaks; and they are left uncertain when a "brief" break becomes a "long" one during which bans on such discussions are considered unconstitutional.

Trial judges (and prosecutors) are in a similar bind in jurisdictions which have not established definitive rules in this area. This is principally because lower courts have applied an automatic reversal rule when errors are made in this context. In *Perry*, the Court refused to apply the prejudice analysis of *Strickland*. *Perry*, 488 U.S. at 278-80. The court below and others have interpreted this to require reversal when a *Geders-Perry* error is made, even if the error was harmless. *Futo*, 832 F.2d at 814; see, e.g., *Jones v. Vacco*, 944 F. Supp. 229 (S.D.N.Y. 1996); *Joseph*, 646 N.E.2d at 809; *State v. Stover*, 881 P.2d 553, 556-57 (Idaho Ct. App. 1994).

As the law now stands, a judge or prosecutor risks undoing the best efforts of the government and the jury simply by issuing an order intended to stop wrongful communication between defendants and their counsel. This is especially problematic when a recess that was intended to be "brief" at the

outset becomes "long" due to unforeseen circumstances (e.g., a lunch break becomes a three hour recess because a defense witness was late, the judge has a family emergency, a juror takes ill, or there is need for an immediate hearing *in limine* to litigate a new legal matter raised by the defendant's testimony). See, e.g., *Jones*, 944 F. Supp. 229 (overnight recess became weekend recess due to snow storm). Trial courts rely on *Perry* at their peril.

Certiorari should be granted so that this Court may adopt a simple rule that solves this problem -- a rule which flows directly from the earlier decisions in this area. The implicit, logical, corollary of *Perry* and *Geders*, but one which only some of the lower courts have recognized, is that the focus should be on the scope of the trial court's order, rather than on the length of the recess. The problem in *Geders* was that defendant and his counsel could not talk about **anything** -- a problem of scope. That problem did not exist in *Perry* because, as the Court found, the break was too short for anything but the defendant's ongoing testimony to be discussed. 488 U.S. at 283-84.

An order which prohibits a defendant from speaking with counsel about ongoing testimony, but does not forbid discussion of any other topic, should therefore be held constitutional regardless of the length of the break. This analysis is tethered closely to the rights and interests of concern to the Court in *Geders* and *Perry;* and judges and prosecutors would not have to guess when the thin line between what is constitutionally "brief" and what is unconstitutionally "long" has been crossed.

This Court recognized in *Perry* that this issue is "important" and "frequently arises." 488 U.S. at 277. Recesses occur during a defendant's testimony for a host of legitimate reasons despite the best efforts of all concerned to avoid them. Resolution of the issue presented would clarify the approach to be taken when recesses inevitably occur in thousands of criminal trials across the land.

B. Certiorari Should Be Granted To Establish That There Is A Prejudice Component To Violations Of The Right To Consult With Counsel During Recesses In The Midst Of Defendants' Testimony

As noted, the uncertainty left by *Geders* and *Perry* has caused lower courts (such as the Missouri Court of Appeals here) to read those decisions as requiring automatic reversal of the conviction when an error is made. Certiorari should be granted not only because the automatic reversal rule has raised the stakes for a misstep in this uncertain area of the law, but also because it would provide this Court with the opportunity to revisit the role prejudice should play in the analysis of the Sixth Amendment right at issue.

Decisions of this Court since *Perry* have called into question the express refusal by the Court in *Perry* to apply a *Strickland v. Washington* prejudice analysis. *Perry*, 488 U.S. at 279-80. This Court's precedents since *Perry* also provide strong support for incorporating the harmless error doctrine into the Sixth Amendment analysis here.[1]

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[1] Although Missouri has not raised the question of prejudice in the lower courts or in its petition for certiorari, the amici states believe the prejudice issue is so inextricably interwoven into the issue presented in the petition that this Court should reach it as well. In particular, the question

1. ***Prejudice as a Component of the Violation***. In *Strickland*, this Court held that a defendant must prove prejudice to establish a violation of the Sixth Amendment right to effective assistance of counsel. In dictum, this Court in *Perry* refused to follow *Strickland*. *Perry*, 488 U.S. at 278-80; see *id.* at 285 ("In view of our ruling, it is quite unnecessary to discuss whether prejudice must be shown when the right to counsel is denied.") (Kennedy J., concurring). The Court stated that prejudice is not part of the constitutional analysis when there is "direct governmental interference with the right to counsel." *Id.* at 279. That dictum, however, has been undermined by decisions of this Court since *Perry*.

When this Court decided *Perry*, there was uncertainty as to the relationship (if any) between the source of the violation and the need to show prejudice. In *Strickland*, the Court indicated that prejudice need not be shown when there was direct government interference with the right to counsel (whether that interference was the fault of a trial judge, a prosecutor or a police officer). 466 U.S. at 686, 692. By contrast, in *United States v. Cronic*, 466 U.S. 648, 662 n.31 (1984), the Court held that the outcome does not turn on the source of the interference with representation by counsel. Rather, the outcome turns on whether the defendant has shown that the constraints, whatever their source, adversely affected the

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whether the defendant must prove prejudice to establish a Sixth Amendment violation goes directly to the nature of the right--the very issue presented by Missouri in its petition and "fairly subsumed" within it. This Court should therefore grant review to address all the issues presented in the petition and in this brief. Cf. *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-38 (1991) (Stevens, J., dissenting).

fairness of the trial. *Id.* The Court in *Perry* chose the former approach.

The trend in Sixth Amendment jurisprudence, however, is unmistakably toward a requirement that the defendant prove both the denial of effective representation by counsel -- whatever its source -- and prejudice from which it can be concluded that he was denied a fair trial. See, e.g., *Satterwhite v. Texas,* 486 U.S. 249, 254-58 (1988) (state interference with Sixth Amendment right to counsel infected the entire capital sentencing proceeding but was subject to harmless error analysis). Indeed, it is now the rare constitutional violation which this Court deems sufficiently egregious and pervasive to warrant automatic reversal. See *Arizona v. Fulminante,* 499 U.S. 279, 306-07, 309-10 (1991). More to the point, it is only the rare Sixth Amendment violation that now escapes prejudice scrutiny. *Id.* at 306-07.

The Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. The central issue, therefore, is whether the Sixth Amendment violation denied the defendant a fair trial. Only when that question is answered in the affirmative will the defendant be entitled to reversal. See *Lockhart v. Fretwell*, 506 U.S. 364, 368-70 (1993). The outcome does not turn on who, or what entity, caused the violation. The Court in *Strickland* explained why it continued to presume prejudice for a handful of Sixth Amendment violations:

> Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. [*Cronic*, 466 U.S.] at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy

> to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

466 U.S. at 692. That rationale is wholly inapplicable to the Sixth Amendment right at issue here.

As discussed at length in Section A above, the violation has not been "easy to identify." And in most cases, the prosecutor is not "directly responsible" for the recess. Many times, the recess is caused by circumstances beyond everyone's control. The realities of trial practice often require recesses despite the best efforts of everyone involved to avoid them. Moreover, the automatic reversal rule may encourage manipulation by the defense to encourage a recess during defendant's testimony or requests by the prosecution to continue that testimony into the wee hours to avoid a recess. In short, the violation is usually not "easy for the government to prevent" except by permitting defendants to do what they are not permitted to do. *Id.*

Prejudice is also not "so likely" here. Indeed, prejudice is manifestly *unlikely* in the usual case. The defense strategy will have been formulated, the defendant prepared, and his testimony discussed before he steps onto the witness stand. There will rarely be anything new to discuss at this stage of the trial *except for* the ongoing testimony itself, which cannot be discussed.

Finally, the inquiry into prejudice is worth the cost for the very same reasons it is worth the cost with respect to the myriad of alleged *Strickland* violations. Automatic reversal imposes a high cost on society, victims and witnesses, as

demonstrated by the reversal of the four murder convictions in this case.

2. ***Harmless Error***. Although *Perry* only addressed the *Strickland* prejudice analysis, its dictum has been interpreted by lower courts, including the court below, to preclude a harmless error analysis.[2] This Court need not, of course, reach the issue of harmless error if -- as the amici states suggest -- certiorari is granted and the rule proposed in Section A is adopted. Nevertheless, the granting of certiorari in this case would provide this Court with the opportunity to clarify the role of harmless error in this area. Simply put, any notion that *Geders* and *Perry* require automatic reversal does not survive scrutiny under *Arizona v. Fulminante* and its progeny. The Sixth Amendment violation at issue is "trial" in nature, thereby subject to harmless error analysis.

Harmless error review has become "an integral component of our criminal justice system." *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring). An automatic reversal rule in the *Geders-Perry* situation ignores this "integral component" and also necessarily ignores the sound policy

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[2] There is an important distinction between the prejudice and harmless error concepts. See *Lockhart*, 506 U.S. at 369 n.2. Where prejudice is an element of the Sixth Amendment violation, the defendant must affirmatively prove prejudice to establish the constitutional violation and win reversal. See *Strickland*, 466 U.S. at 687. There are other Sixth Amendment cases where the defendant does not need to prove prejudice to win reversal, but the state is afforded the opportunity to avoid reversal by proving that the established constitutional violation was nonetheless harmless beyond a reasonable doubt. E.g., *Satterwhite*, 486 U.S. at 254-58. See also *Webb v. State*, 663 A.2d 452, 460-61 (Del. 1995) (defendant need not prove prejudice to establish *Geders-Perry* violation, but court applied harmless error analysis).

undergirding the harmless error doctrine. As stated in *Arizona v. Fulminante*:

> the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

499 U.S. at 308 (quoting *Delaware v. Van Arsdall*, 475 U.S. 675, 681 (1986)).

In *Fulminante* -- decided more than two years after *Perry* -- this Court drove home the point that virtually all constitutional violations are subject to harmless error analysis. 499 U.S. at 306-07. That decision for the first time recognized a distinction between constitutional errors that are "trial" in nature, and subject to harmless error analysis, from those few that are "structural" in nature, and subject to automatic reversal. *Id.* at 309. A "trial" error is one that occurs during the presentation of the case, the impact of which may be quantitatively assessed in the context of the other evidence presented. *Id.* at 307-08. A "structural" error concerns the trial mechanism itself and defies harmless error analysis because it affects the conduct of the entire trial from beginning to end. *Id.* at 309-10. See *Sullivan,* 508 U.S. at 281; *California v. Roy,* 65 U.S.L.W. 3338 (Nov. 4, 1996) (*per curiam*).

Most Sixth Amendment violations are now considered "trial" in nature subject to harmless error analysis.

Fulminante, at 306-07, 309-10; see *Sullivan*, 508 U.S. at 282-83 (only the "rare case" is not subject to harmless error analysis) (Rehnquist, C.J., concurring). For example, direct state interference with the Sixth Amendment right to the presence of counsel has been held to be subject to harmless error analysis. *Satterwhite v. Texas*, 486 U.S. 249 (1988) (denial of counsel at death penalty sentencing phase psychiatric interview subject to harmless error review).

Moreover, the category previously carved out by this Court for "state interference with counsel's assistance," *Strickland*, 466 U.S. at 692, certainly does not survive the *Fulminante* analysis. Proof of "state interference" only begs the question whether the violation was "trial" or "structural" in nature. There certainly was "state interference" in *Satterwhite* with the right to counsel, yet this Court applied the harmless error doctrine. See also *Fulminante*, 499 U.S. at 307 (citing *Milton v. Wainwright*, 407 U.S. 371 (1972) (holding that the admission of a confession obtained in violation of the Sixth Amendment right to counsel was harmless beyond a reasonable doubt)).

Only those rare Sixth Amendment violations such as the complete denial of counsel by the state, *Gideon v. Wainwright*, 372 U.S. 335 (1963) -- that is, those violations that are truly "structural" in nature because they infect the entire trial from beginning to end, *Fulminante*, 499 U.S. at 309-10 -- still warrant automatic reversal. The violation at issue here simply was not so pervasive that it adversely affected the entire trial from beginning to end making it "structural" in nature. Reversal of four murder convictions for an alleged error that in all likelihood had no impact on the fairness of the

trial at issue is unsupported by precedent since *Perry* and is too high a price for society to pay.

CONCLUSION

The amici states respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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